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Leong Yeu Moi (f) v Neo Ai Si (f) & Anor

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HIGH COURT (MIRI) — ORIGINATING SUMMONS NO MYY-24–46/7 OF 2013
STEPHEN CHUNG J
21 MARCH 2014

C

Civil Procedure — Originating summons — Whether appropriate — Substantial disputes of facts — Determination of existence or validity of trust — Whether proceedings should have been commenced by writ — Conversion of originating summons to writ action

D

Land Law — Trusts — Presumption of implied trust — Absence of specific language creating trust — Registered proprietor presumed to hold property on trust for persons who pays purchase money

E

Trusts and Trustees — Implied trust — Presumption of implied trust — Absence of specific language creating trust — Registered proprietor presumed to hold property on trust for persons who pays purchase money

F

Trusts and Trustees — Trust — Types of trust — Ingredients necessary for creation of trust

By an originating summons ('OS'), the plaintiff prayed for a declaration that a double-storey semi-detached house ('the house') was held on trust by the defendant's estate for the plaintiff. The plaintiff submitted that the deceased held the house on trust for her whereas the defendant contended that the deceased did not hold the house on trust for the plaintiff. There was no document exhibited to establish an express trust between the plaintiff and the deceased. Based on the affidavits filed in this application, there were disputes of facts and law which had to be determined in a trial by calling witnesses.

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Held:

(1) There are four types of trust, namely express trust, implied trust, resulting trust and constructive trust. To create a trust, there are three ingredients necessary for the creation of the trust: (a) certainty of words; (b) certainty of subject matter; and (c) certainty of object. A constructive trust is imposed by operation of law, ie it overrides the intention of the parties.

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When a person deals with a property in a way which is deemed to be unconscionable, a court of equity will construe the person to be a trustee of that property (see para 3).

(2) A court may presume an implied trust despite the absence of specific language creating a trust. The registered proprietor is presumed to hold the property on trust for the person who had supplied or paid the purchase money for the property (see para 4).

(3) There were substantial disputes of facts and it was not appropriate to decide the existence or validity of the trust. Hence the OS application was refused and should be converted into a writ and to be set down for trial (see para 17); *Abdul Majid v Har Abdul Razak* [1971] 2 MLJ 228 referred.

[Bahasa Malaysia summary

Melalui saman pemula ('SP'), plaintif memohon untuk perisytiharan bahawa rumah kembar dua tingkat ('rumah tersebut') adalah dipegang atas amanah oleh estet defendan untuk plaintif. Plaintif berhujah bahawa si mati memegang rumah tersebut atas amanah untuknya sebaliknya defendan berhujah bahawa si mati tidak memegang rumah atas amanah untuk plaintif. Tidak terdapat dokumen yang dilampirkan untuk membuktikan amanah nyata di antara plaintif dan si mati. Berdasarkan atas afidavit yang difailkan dalam permohonan ini, terdapat pertikaian fakta dan undang-undang yang mana perlu ditentukan dalam perbicaraan dengan memanggil saksi.

Diputuskan:

(1) Terdapat empat jenis amanah, iaitu amanah nyata, amanah tersirat, amanah berbangkit dan amanah konstruktif. Untuk membentuk amanah, terdapat tiga bahan yang perlu untuk pembentukan amanah: (a) kepastian perkataan-perkataan; (b) kepastian perkara; dan (c) kepastian objek. Amanah konstruktif dikenakan melalui pelaksanaan undang-undang, iaitu ia mengatasi niat pihak-pihak. Apabila seseorang berurusan dengan hartanah dalam cara yang mana dianggap tidak berpatutan, mahkamah ekuiti akan mentafsirkan orang tersebut adalah pemegang amanah hartanah tersebut (lihat perenggan 3).

(2) Mahkamah mungkin akan menganggap amanah tersirat meskipun ketiadaan bahasa spesifik yang membentuk amanah. Pemilik berdaftar dianggap memegang hartanah atas amanah untuk orang tersebut yang memberikan atau membayar harga belian untuk hartanah tersebut (lihat perenggan 4).

(3) Terdapat pertikaian fakta yang substansial dan ia tidak wajar untuk memutuskan kewujudan atau kesahan amanah tersebut. Maka permohonan SP tersebut ditolak dan patut ditukar kepada writ dan

ditetapkan untuk perbicaraan (lihat perenggan 17); *Abdul Majid v Har Abdul Razak* [1971] 2 MLJ 228 dirujuk.]

Notes

For cases on whether originating summons is appropriate, see 2(3) *Mallal's Digest* (5th Ed, 2015) paras 6414–6419.

For cases on trusts in general, see 8(3) *Mallal's Digest* (5th Ed, 2015) paras 5820–5821.

For a case on implied trust, see 12(2) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 2863.

Cases referred to

Abdul Majid v Har Abdul Razak [1971] 2 MLJ 228 (refd)
Lee Phek Choo v Ang Guan Yau & Anor [1975] 2 MLJ 146, FC (refd)
Pathma d/o Naganather & Anor v Nivedita d/o Naganather (No 1) [2002] 6 MLJ 361; [2003] 8 CLJ 457, HC (refd)
Perman Sdn Bhd & Ors v European Commodities Sdn Bhd & Anor [2006] 1 MLJ 97; [2005] 4 CLJ 750, CA (refd)
Yeong Ah Chee v Lee Chong Hai & Anor and other appeals [1994] 2 MLJ 614; [1994] 3 CLJ 20, SC (refd)

Rajesh Jethi (Jethi & Assoc) for the plaintiff.
Merlyn Toh (Merlyn Toh & Co) for the defendant.

Stephen Chung J:

[1] By an originating summons, the plaintiff prays for a declaration that a double-storey semi-detached house described as Lot 1550 Block 2 Miri Concessions Land District is held on trust by the defendant's estate for the plaintiff; and for an order that the defendant's estate shall transfer Lot 1550 Block 2 Miri Concession Land District ('MCLD') to the plaintiff failing which the senior assistant registrar of the High Court at Miri shall execute a memorandum of transfer for and on behalf of the defendant's estate to the plaintiff.

[2] The plaintiff submitted that the deceased held Lot 1550 Block 2 MCLD on trust for her whereas the defendant contended that the deceased did not hold Lot 1550 Block 2 MCLD on trust for the plaintiff and that there was no evidence of trust created in favour of the plaintiff.

[3] There are four types of trust, namely express trust, implied trust, resulting trust and constructive trust. To create a trust, there are three ingredients necessary for the creation of the trust: (a) certainty of words; (b) certainty of subject matter; and (c) certainty of object. A constructive trust is

imposed by operation of law, ie it overrides the intention of the parties. When a person deals with a property in a way which is deemed to be unconscionable, a court of equity will construe the person to be a trustee of that property: see *Yeong Ah Chee v Lee Chong Hai & Anor and other appeals* [1994] 2 MLJ 614; [1994] 3 CLJ 20 and *Perman Sdn Bhd & Ors v European Commodities Sdn Bhd & Anor* [2006] 1 MLJ 97; [2005] 4 CLJ 750.

[4] A court may presume an implied trust despite the absence of specific language creating a trust. The registered proprietor is presumed to hold the property on trust for the person who had supplied or paid the purchase money for the property: *Pathma d/o Naganather & Anor v Nivedita d/o Naganather (No 1)* [2002] 6 MLJ 361; [2003] 8 CLJ 457.

[5] The plaintiff averred that at the end of January 2008 she purchased Lot 1550 Block 2 MCLD ('the property') together with a relative Chee Ah Chuan @ Se Poh Eng and her daughter Chong Lai Kit (who is an undischarged bankrupt) at a purchase price of RM255,000. A broker Patrick Ng was appointed as their nominee and trustee as the purchaser of the property. Subsequently, her relative decided not to proceed with the purchase but the plaintiff agreed to continue to purchase the property.

[6] The plaintiff averred that on 20 March 2008 a sale and purchase agreement and a memorandum of transfer (exh LYM 4) were executed between Patrick Ng and the vendor. On 8 July 2008 a power of attorney (exh LYM 9) was granted in favour of Patrick Ng by the vendor in respect of the property.

[7] The plaintiff averred that subsequently Patrick Ng decided not to continue as the nominee of the plaintiff. The deceased was then appointed as the nominee of the plaintiff and the property was transferred to the deceased by Patrick Ng vide a memorandum of transfer (exh LYM 10).

[8] The plaintiff did not plead specifically whether she relied on an express trust, implied trust, resulting trust or constructive trust. However, the plaintiff submitted that she made payments totalling RM80,000 (exhs LYM 2 and LYM 3) which were acknowledged and received by the vendor. The plaintiff submitted that the vendor also issued receipts in her name for sums amounting to RM255,000 paid by her.

[9] The plaintiff submitted that on 1 January 2010 the property was rented to one Ho Chiah Liang by the plaintiff. The plaintiff averred that the tenancy agreement was signed by Chong Lai Kit on behalf of the deceased and that the monthly rentals were paid to the plaintiff via standing instructions by the tenant to CIMB Bank (exhs LYM 13 and LYM 14) instead to the deceased. The plaintiff averred that on 13 September 2010 she lodged a caveat against the

property to prevent the deceased from dealing with the property (exh LYM 15). A

[10] The plaintiff also averred that on 13 August 2009 the memorandum of transfer from the vendor to Wong Tiong Hua (deceased) as the plaintiff's nominee was signed in the presence of Antonio Sim, Chong Lai Kit and plaintiff. B

[11] The defendant denied the allegations of the plaintiff and averred that there was nothing in writing that the deceased had agreed to be appointed as the nominee of the plaintiff to hold the property on trust for the plaintiff. It was submitted that the execution of the memorandum of transfer to the deceased was for a consideration of RM250,000. The defendant submitted that in the case of *Lee Phek Choo v Ang Guan Yau & Anor* [1975] 2 MLJ 146, it was held that the statute of frauds applied to Sarawak and that a declaration of trust which is not evidenced in writing is not enforceable. C D

[12] The defendant submitted that the plaintiff relied on a statutory declaration of Patrick Ng (exh LYM 12) that the deceased was holding the property on trust for the plaintiff. The defendant submitted that the statutory declaration was made by Patrick Ng after he ceased to be the nominee of the plaintiff and after the death of the deceased. It was submitted that it should not be used in this application. E

[13] The defendant did not exhibit any receipt that the deceased had paid for the property. Although the plaintiff has exhibited documents in particular the receipts to show that she paid for the property, the defendant has denied that the deceased was the nominee and or trustee of the plaintiff in respect of the property. There was no document exhibited to establish an express trust between the plaintiff and the deceased or to appoint the plaintiff as the attorney of the deceased pursuant to a power of attorney. F G

[14] Based on the affidavits filed in this OS application, there are disputes of facts and law. The court should not made any finding of facts based on the disputes raised in the affidavits in such a case. The facts should be determined in a trial by calling witnesses to establish the claim of the plaintiff that the deceased was at all material times that he was the nominee and trustee of the plaintiff in respect of the said property. H

[15] Although Patrick Ng had made a declaration that he was previously the nominee and trustee of the plaintiff holding the property on behalf of the plaintiff, his averments were not tested and not subject to cross-examination. Patrick Ng should testify and explain why he transferred the property to the deceased and whether he or the plaintiff had received any payment from the deceased when the transfer was executed. I

[16] Mr Antonio Sim has not affirmed any affidavit but is in a position to explain and clarify whether the deceased was signing the transfer as the nominee or trustee of the plaintiff. Similarly, Chong Lai Kit and Ho Chiah Liang could testify and explain the transactions in respect of the property.

[17] In this OS application, there are substantial disputes of facts and it is not appropriate to decide the existence or validity of the trust: *Abdul Majid v Har Abdul Razak* [1971] 2 MLJ 228. For the reasons given, the OS application is refused and should be converted into a writ and to be set down for trial. It is up to the parties to decide whether to treat the affidavits filed as to stand as the pleadings in this action or to file new pleadings for the trial. Costs to be in the cause.

Reported by Kanesh Sundrum